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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CITY OF PHOENIX,

Petitioner,

v.

WEST PUBLISHING COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF ARIZONA

PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Where a national law book publishing company maintained within a municipal taxing jurisdiction for more than 20 years an employee salesman-representative to obtain new customers and to service old customers for increased book sales, and where the book company had also actively solicited and obtained the right to recodify, publish and sell the state statutes in that jurisdiction, does not such business activity provide a sufficient nexus for the imposition of a privilege license (sales) tax by the city on the gross receipts from the sale of the company's books to customers within the city against claims that such a tax violates either the due process or commerce clauses of the Federal Constitution, in light of this Court's decision in *Standard Pressed Steel Co.* v. *State of Washington*, 419 U.S. 560 (1975).

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

The official opinion is not yet published. The unofficial opinion of the Court of Appeals of the State of Arizona can be found at 712 P.2d 944 (1985). (Appendix Item A).

GROUNDS UPON WHICH JURISDICTION IS INVOKED

The decision of the Court of Appeals of the State of Arizona was dated September 17, 1985. The city, pursuant to the provisions of Arizona Rules of Civil Appellate procedure, Rule 23, filed its Petition for Review in the Supreme Court of the State of Arizona. This Petition was denied by the Supreme Court on January 14, 1986. (Appendix Item B).

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1257(3) to request this Court's issuing its writ of certiorari, inasmuch as a privilege or immunity from the imposition of the Privilege License Tax of the City of Phoenix upon West Publishing Company has been claimed under the authority of the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AT ISSUE

West Publishing Company claimed that its gross receipts were immune from the tax imposed by the City of Phoenix by virtue of the provisions of Article I, § 8, Clause 3 of the Constitution which grants to Congress the power:

> "To regulate Commerce with foreign Nations, and among the several States, . . ."

and, the provisions of Article of Amendment XIV, Due Process Clause:

> "§ 1 . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE FACTS

The undisputed facts are contained in the transcript of the trial herein held in Maricopa County Superior Court (hereinafter T.R. p.), and statutory provisions set out in the Arizona Revised Statutes.

In 1951 the State Legislature created a Code Commission (Arizona Code Annotated, 1952 Supplement, §§ 8-14). Following this mandate of the Legislature to revise codify and annotate the laws of the State, the Commission contracted with West Publishing Company to prepare an analysis and compilation of the statute law. This was designated as the "Statute Plant". (Report of Chief Counsel to the Code Commission; Volume 2, A.R.S. pp. XI-XIX). West sent members of its editorial staff to Phoenix, Arizona where they advised a group of volunteer local attorneys to do the assembly work on the statutes which were used to create the Arizona Revised Statutes. (Prior to this the statutes had appeared in the Arizona Code Annotated, published by a different publihser). Two senior members of the West staff were in charge of this work, which was completed in Phoenix. These editors came to Phoenix to supervise this work. (Testimony of Arthur Grucky, T.R. pp. 68-70).

The Arizona Revised Statutes created from this work were initially published in 1956, and have been the statutory compilation for Arizona since that date. It is undisputed that every practicing attorney in the State and the City of Phoenix is required to have a copy of these statutes in order to properly hold himself out as an attorney.

From before that date and thereafter West Publishing Company sold all its materials, including the National Reporter System and other books, throughout the City and State. From as early as 1955 to date West Publishing Company has a full-time employee located in the City of Phoenix, Mr. Arthur Grucky, who testified at the Superior Court trial.

As salesman Mr. Grucky was charged with the soliciting orders for West Publishing Company, calling on prospective buyers, who are typically lawyers, judges and law libraries. He handled all publications of West Company. He identified Trial Exhibit 7, a copy of an advertisement appearing in the Arizona Bar Journal, an official publication of the State Bar for 1980, which described him and his counterpart in the City of Tucson as "law library experts". He states that "advisory duties" as described in this

advertisement formed part of his job. (T.R. p. 58). He stated that his job duties have not changed substantially from 1955 to the date of the trial.

Mr. Grucky also testified that in soliciting a newly-admitted attorney, he secured information which would enable West to determine credit risk.

Grucky was paid solely by commission and not reimbursed for expenses. During the course of his years as a salesman he placed advertisements in the yellow pages of the Phoenix metropolitan area telephone directory. This ad listed his home since he did not rent an office, but ran West's operations entirely out of his home.

West's Sales Manager, Raymond Highness, testified (T.R. pp. 74-75) that Mr. Grucky was an employee of West Publishing Company, and could work only for them. He also said that it would be considered "proper action" for Mr. Grucky to do some initial handling of complaints that a customer might have concerning West, and that he would at least be responsible for forwarding the complaint to West's home office in St. Paul, Minnesota.

THE CITY OF PHOENIX TAX AND LICENSING SYSTEM

The City of Phoenix operates a Privilege License Tax system independently of that of the State of Arizona. Under the provisions of Phoenix City Code § 14-2 it imposes a tax:

> "Upon persons on account of their business activities within the City ... in accordance with the following schedule:
>
> (a) The tax rate shall be at an amount equal to one percent of the gross income from the business upon every person engaging or continuing in the following business activity;
>
> * * *
>
> (8) Selling any tangible personal property whatsoever at retail, except bonds and stocks and the sale of drugs..."

In order to assist in the administration of this tax, the City requires licensing under the provisions of Code § 14-12. While this code section has been changed from time to time, the essential thrust, i.e., using a license system to located potential taxpayers and to provide for the tracking of tax returns, has been in effect since 1952 in the City of Phoenix.

At no time until after the initiation of the audit proceedings herein, conducted by City of Phoenix auditors at the home office of West in St. Paul in 1979, did West Publishing Company obtain a license from the City of Phoenix or pay any sales tax to the City of Phoenix.

West testified however that in the 46 of the 50 states in the United States which impose various forms of sales or use taxes, West pays such taxes to all of the state jurisdictions. Specifically West stated that it had paid a use tax since 1970 to the State of Arizona, collecting it from its customers and remitting it to the State Department of Revenue. Testimony of Peter Colvin, West Tax Accountant; T.R. pp. 91-107. In addition, West pays similiar taxes to many cities, including Duluth, Minnesota, the only city in West's home state which imposes such a tax. West's editorial offices and printing plants are all located in Minnesota, and 99%+ of the actual printing is done in that state. Its 107 outside salesmen are the only employees of West regularly employed outside Minnesota.

The parties stipulated that through the tax years for which the city imposed a tax, 1956 through February of 1979, the gross receipts earned by West from sales to customers solely within the city limits of the City of Phoenix, amounted to $8,594,237.

FEDERAL QUESTIONS RAISED BELOW

The Court proceedings were commenced by the filing of a Complaint by the City of Phoenix in support of its assessment upon all taxes for the period in question. West's answer affirmatively alleges many facts and the legal conclusion that the "Defendant has no contact or nexus with the City." (Answer, Paragraph 9P; Appendix Item C.) The answer also specifically

alleges that "the proposed deficiency violates the Equal Protection and Due Process Clauses of the United States Constitution and the Constitution of the State of Arizona. (Answer, Paragraph 9R).

At the conclusion of the trial the Superior Court entered its minute entry decision which read as follows:

> "The Court finds that the City of Phoenix only contact with West is the fact that Mr. Grucky has chosen to locate his home in the City of Phoenix; that during the years he was covering the entire State, he could have just as well chosen to live in Scottsdale, Mesa or in an unincorporated portion of Maricopa County.
>
> The court further finds that West's activities in connection with the 1956 Code were only conducted in Phoenix as being capitol city (sic).
>
> The Court further finds that the imposition of Privilege License taxes on the Defendant, based on the facts in this case, is a violation of the Due Process Clause of the U.S. Constitution and the Arizona Constitution, and is also prohibited by both the Nation and State Constitutions as an impeachment to interstate commerce." (Appendix Item D).

The City of Phoenix in its state appeal specifically claimed in its "Issues Presented" that the tax did not contravene any federal commerce clause or due process clauses. (Appendix Item E).

The decision of the Arizona Court of Appeals indicates that the sole basis of its decision was as follows:

> "We find West's activity within the City to be insufficient to establish the necessary constitutional nexus justifying imposition of the tax in question." (Appendix Item A, p. 1).

In its Petition for Review, the City reiterated its constitutional position. (Appendix Item F.)

No decision or opinion was issued by the Supreme Court of Arizona in denying this Petition.

Although reference was made to the "due process" clause of the Arizona Constitution (Article II, § 4 "No person shall be deprived of life, liberty or property without due process of law"), this clause was not cited by any Arizona court. There is no state "commerce clause" except as derived under the Federal Constitution and Article II, § 3 of the Arizona Constitution which reads: "The Constitution of the United States is the supreme law of the land."

ARGUMENT

It is the position of Petitioner herein that the decision of the Court of Appeals is flatly and absolutely contrary to the decision of this court in *Standard Pressed Steel Company* v. *State of Washington,* 419 U.S. 560 (1975).

The facts of that case showed that the Appellant was a manufacturer of industrial and aerospace fasteners. It had one plant in Pennsylvania and one in California. Its principal customer in Washington was the Boeing Company in Seattle. During the years relevant to the audit in question, it had one employee in Washington named Martinson, who was paid a salary and who operated out of his home. He was an engineer whose primary duty was to consult with Boeing regarding its anticipated needs and requirements for his company's product and to follow up any difficulties in the use of these products after deliver. He was assisted by a group of engineers who visited Boeing about three days every six weeks, Martinson arranging these meetings.

Martinson did not even take sales orders from Boeing; they were sent directly to Massachusetts or California, and shipped direct by common carrier. In his home "office", Martinson had no secretary, but maintained an answering service for which his company paid the bills.

Standard Pressed Steel claimed that the imposition of the tax "violates due process because the in-state activities were so thin and inconsequential as to make the tax on activities occurring beyond the borders of the state one which has no reasonable

relation to the protection and benefits conferred by the taxing state, . . ."

Mr. Justice Douglas, speaking for a unanimous Court, held:

> "We think the question in the context of the present case verges on the frivolous. For appellant's employee, Martinson, with a full-time job within the state, made possible the realization and continuance of valuable contractual relations between appellant and Boeing."

The due process nexus issue, as this Court thus defined it, turns on whether or not the activities of an individual acting on behalf of his employer corporation makes possible "the realization and continuance of valuable contractual relations" with the customer of that company within the taxing jurisdiction.

The activities of Mr. Grucky as a salesman for West Publishing Company, contacting all the lawyers, law libraries and other potential customers of West within the City of Phoenix, made possible the realization and continuance of valuable contractual relations between these attorneys, libraries and similar customers, and West Publishing Company. The due process norms of *Standard Pressed Steel, supra,* have been clearly met by Phoenix.

The Commerce Clause norms for nexus have been set forth by this Court in *Complete Auto Transit* v. *Brady,* 430 U.S. 274 (1977), which held that a local tax, by any name, is valid if it is "applied to an activity with a substantial nexus within this taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state." (430 U.S. at 279).

The Phoenix tax is apportioned exactly to the sales made to customers within the City of Phoenix and no more. There has been no discrimination against interstate commerce, as these sales were not taxed elsewhere. Local book sales are also taxed, and no discrimination exists. The activities of Grucky made possible the realization and continuance of valuable contractual relations between West Company and its customers in the City of Phoenix. Further the City of Phoenix tax, as a general tax,

benefits West Publishing Company as that company is represented by its employee. Mr. Grucky, at both the place where he maintains his business activity (his home in this case), and as he travels about the City streets, seeking West's customers, and doing West's business, receives the normal governmental services provided by Phoenix to all of its businesses and citizens, for which general tax impositions are properly laid. If Mr. Grucky occupied a small storefront from which he sold candy and ice cream, there would be no question about the propriety of the imposition of this tax. Here through the years, he has helped in the generation of an $8.5 million business by West Publishing Company, a business which West itself actively created within the State of Arizona. There is far more than a light and casual connection between West Publishing Company and the State of Arizona, and the law business of the state as it exists within the City. The norms of *Complete Auto Transit, supra*, have been met.

Although the Court of Appeals of the State of Arizona held:

> "The activities conducted by West within the boundaries of the city demonstrate that the city has not offered nor extended any consequential services, protections or benefits for which it can exact the privilege tax.",

it is difficult to imagine what "consequential services, protections or benefits" were extended to Mr. Martinson in the *Standard Pressed Steel* case *supra*, operating out of his home and traveling back and forth between his home and the Boeing plant, which were not also extended to Mr. Grucky operating out of his home and traveling throughout the City of Phoenix to carry on the business of West.

The decision of the Court of Appeals of the State of Arizona, as affirmed by the Supreme Court of this state, is flatly and absolutely contrary to the decision of this Court in *Standard Pressed Steel* v. *State of Washington*, 419 U.S. 560 (1975). It is also contrary to every decision of this Court regarding the imposition of local sales taxes in the last twenty years. See, e.g., *National Geographic Society* v. *California Board of Equalization*, 430 U.S. 551 (1977).

CONCLUSION

It is, under the authority of *Standard Pressed Steel, supra*, respectfully submitted that this Court should enter its order granting certiorari herein, vacating the judgment of the Court of Appeals of the State of Arizona and remanding the same with its finding that the Federal Constitution does not prohibit the imposition of the Phoenix Privilege License Tax upon the sales in issue, and for further proceedings not inconsistent therewith.

RESPECTFULLY SUBMITTED this ..... day of April, 1986.

PHILIP M. HAGGERTY
Phoenix, Arizona
Member of the Bar of This Court

APPENDIX A

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CITY OF PHOENIX, a municipal corporation,
Plaintiff-Appellant,

v.

WEST PUBLISHING COMPANY, a foreign corporation,
Defendant-Appellee.

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1 CA-CIV 6716
DEPARTMENT C
OPINION

APPEAL FROM THE SUPERIOR COURT OF MARICOPA COUNTY
CAUSE NO. C-407753
THE HONORABLE ROBERT W. PICKRELL, JUDGE
AFFIRMED

ANDY BAUMERT, City Attorney
By PHILIP M. HAGGERTY,
Assistant City Attorney

Attorneys for Plaintiff-Appellant
Phoenix

LEE, THEISEN & EAGLE
By DAVID W. EAGLE
LAWRENCE J. LEE

Attorneys for Defendant-Appellee
Phoenix

BROOKS, *Judge*

This appeal involves an attempt by the City of Phoenix (City) to impose its privilege license tax on West Publishing Company (West.) A number of issues and cross-issues are raised, but only one need be addressed as it is dispositive of this appeal.

We find West's activity within the City to be insufficient to establish the necessary constitutional nexus justifying impostition

of the tax in question. We therefore affirm the judgment entered by the trial court.

FACTS AND PROCEDURAL HISTORY

West is a Minnesota corporation involved in the publication and sale of legal books and periodicals, including the Arizona Revised Statutes. Its editorial offices, manufacturing plant, warehouses and shipping facilities are all located in St. Paul, Minnesota. None of West's sales are channeled through a wholesaler or distributor. All orders are filled from West's inventory in St. Paul and shipment of publications are made directly to the subscribers by common carrier or by United States mail. Title and possession passes to the subscribers upon delivery of the publications to the common carrier or to the mail service in St. Paul. *See Salt Rvier Project* v. *City of Phoenix*, 132 Ariz. 337, 645 P.2d 1251 (App. 1982).

West markets the bulk of its products by direct mail which is conducted solely and exclusively in St. Paul. It also employs 107 sales representatives scattered throughout the United States who solicit and transmit orders to St. Paul for acceptance.

West does not own or lease an office or other facility in Arizona nor does it maintain an inventory in this state. The West representative assigned to Arizona since 1955 is Mr. Arthur Grucky, who conducts business out of his home in the City of Phoenix. Grucky is compensated solely on a commission basis and is personally responsible for his operating and overhead expenses. In this regard, he also pays his own telephone expenses and lists himself in the classified (yellow) pages of the telephone directory under "Law Books" as the "West Publishing Sales Representative". Grucky has only one function, that of seeking orders and answering questions relative to West's products. He has no authority to bind West to any particular contract as all orders and applications for credit must be approved in St. Paul. He does not receive payments on orders nor does he collect delinquent accounts or make adjustments in case of complaints by customers. During the period of time at issue in this appeal, only

approximately twelve percent of West's gross sales in the City of Phoenix resulted from Grucky's solicitation efforts. The balance of the transactions were conducted by direct mail between West and its subscribers.

The City of Phoenix imposes a privilege license tax on various forms of business activity conducted within its city limits. At the time of the imposition of the tax at issue, Art. I § 14-2 of the City Code provided, in relevant part, as follows:

> Section 14-2 Imposition of Tax; tax—schedule
>
> There is hereby levied upon persons on account of their business activities within the City and shall be collected by the Collector for the purpose of raising revenue to be used in defraying the necessary expenses of the City, privilege taxes to the extent hereinafter provided, to be measured by the gross sales or gross income of persons, whether derived from residents of the City or not, or whether derived from within the City or from without, and all of said gross sales or gross income shall be used to measure the tax with exceptions as set forth in Subsections (b) and (d) of this Section 14-41 or the Phoenix City Code in accordance with the following schedule:
>
> (a) An amount equal to one percent of the gross proceeds or sale or gross income from the business upon every person engaging or continuing within the City in the following business:
>
> * * *
>
> (8) Selling any tangible personal property whatsoever at retail, except bonds and stocks and the sale of drugs on the prescription of a member of the medical, dental or veterinarian profession who is licensed by law to administer such drugs.

In 1978, the City audited West's sales. Because of difficulties involved in its attempts to retrieve certain information, the City auditiors estimated the dollar volume of all sales to Phoenix customers. The City Treasurer used this estimated sales figure to assess a privilege tax in the amount of $109,196.36 for January 1956 through January 1979, together with interest in the sum of

$45,914.74 and penalties amounting to $22,470.28, for a total of $177,581.38. Information later provided caused the City to reform its sales estimate thereby reducing the tax claimed to $83,949.00, with interest in the sum of $57,237.00 and penalties of $19,538.00, for a total of $160,724.00. After the assessment was imposed, West invoked the administrative appeal process of the Phoenix City Code[1] by filing its tax protest. Following a hearing, the hearing officer concluded, in part as follows:

> 1. Sales orders received by West's Phoenix sales representative are subject to the City's privilege tax;
>
> 2. The statute of limitations adopted in the City Code [Art. I, § 14-44.1] limits collection of the tax, and for the period in which the Code did not have a statute of limitations, the State of Arizona limitation provisions apply;
>
> 3. The penalties under City Code [Art. I § 14-19(c)(d)(e) and 14-16] were not shown to be appropriate and were thereby waived.

After the hearing officer issued his decision, the City commenced an action in superior court seeking recovery of the full amount of the taxes pursuant to the assessment imposed prior to the administrative review, including interest and penalties.[2] Following a trial to the court, the trial court found that imposition of the City's priviledge license tax on West violated the due process clauses of the United States and Arizona Constitutions[3] and also constituted an unreasonable burden on interstate commerce in violation if Art. I, § 8, cl. 3 of the United States Constitution. Although no findings of fact or conclusions of law had been formally requested, the trial court made limited findings and concluded that.

> [t]he City of Phoenix' only contact with West is the fact that Mr. Grucky has chosen to locate his home in the City of Phoenix; that during the years that he was covering the entire state, he could have just as well chosen to live in

1. Cite Code Art. I, § 14-29
2. City Code Art. 1, § 14-29.
3. U.S. Const. Amend. § 1; Ariz. Const. Art. II, § 4.

> Scottsdale, Mesa, or in an unincorporated portion of Maricopa County . . . .

The trial court entered judgment in favor of West and this appeal followed.

LEGAL ANALYSIS

Prior to a consideration of the dispositive issue in this case, it is necessary to clarify the nature of the tax sought to be imposed.

It is undisputed that the tax assessed by the City is a business privilege tax which is an exaction for the privilege of doing business within the City limits. This is to be distinguished from a sales tax, which is generally added to the selling price and is borne by the consumer, with the vendor being made an agent of the taxing authority for purposes of collection. Also to be distinguished is a use tax which is complementary to the sales tax and is also borne by the consumer. The use tax is designed to reach out-of-state purchases made by residents within the local jurisdiction. In appropriate circumstances, the out-of-state vendor can be required to collect and remit the use tax in the same manner as if the sale had been consummated within the local jurisdiction. Thus the tax which the City seeks to impose in this case is not a use tax, which would be ultimately paid by the consumer, but a privilege license tax to be imposed *directly* upon West, as the vendor.

A business privilege tax, measured by gross sales arising from such business activities, offends due process unless the activites of the taxpayer have established a sufficient nexus within the taxing jurisdiction. The crucial test is "whether the state [or city] has given anything for which it can ask return." *Standard Pressed Steel Co.* v. *Wash. Dept. of Rev.*, 419 U.S. 560, 561, 95 S.Ct. 706, 708, 42 L.Ed.2d 719, 722 (1975); citing *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, 130 L.R.A. 1229 (1940).

A tax sought to be imposed directly upon the vendor/taxpayer, such as the business privilege tax sought to be imposed by the City in this case, is viewed more carefully and critically than are use taxes, which merely inflict the administrative burden of collection

upon the vendor. In *Norton Co.* v. *Ill. Dept. of Rev.*, 340 U.S. 534, 71 S.Ct. 377, 95 L.Ed.2d 517 (1950), the Supreme Court set forth the following standard:

> Where a corporation chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office for acceptance, filing, and delivery back to the buyer, it is obvious that the state of the buyer has no local grip on the seller. Unless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not taxable. (Citation omitted.) *Of course, a state imposing a sales or use tax can more easily meet this burden, because the impact of those taxes is on the local buyer or user. . . .*

340 U.S. at 537. (Emphasis added.) *See also McLeod* v. *Dilworth*, 322 U.S. 340, 64 S.Ct. 1281, 88 L.Ed. 1319 (1944.)

West is licensed by the State of Arizona for the purpose of collecting and paying a use tax, but it has never acknowledged an obligation to pay a business privilege tax to the State or any of its political subdivisions. We conclude that the nature and quantity of West's activity in the City of Phoenix, as above described, are not sufficient to provide the requisite constitutional nexus for the tax sought to be imposed.

The authorities relied upon by the City are factually distinguishable. For Example, in *Field Enterprises Inc.* v. *State of Washington*, 47 Wash.2d 852, 289 P.2d 1010, *aff'd.*, 352 U.S. 806, 1 L.Ed.2d 39, 77 S.Ct. 55 (1956), a Delaware corporation, with its principal office in Chicago, was engaged in the business of publishing and selling encyclopedias throughout the United States. However, it maintained a division office in Seattle with a division manager and four employees. This office was used as a headquarters to train salesmen and there were 175 salesmen within the state. Based upon these facts, it was held that the tax upon the gross receipts from sales in Washington did not impose an unconstitutional levy upon interstate commerce.

The City also relies on *Norton Co.* v. *Ill. Dept. of Rev., supra*, wherein the taxpayer was a Massachusetts manufacturer of

machines and supplies with a branch office and warehouse in Chicago. In addition to receiving orders which were forwarded to the home office for acceptance, however, the Chicago place of business also performed a number of other functions. It carried an inventory of approximately 3,000 most frequently purchased items from which it served cash customers and those whose credit the home office had approved. For many of the Illinois customers, the Chicago office also acted as an intermediary to reduce frieght charges by receiving and redistributing carload lots of goods. In addition, it serviced equipment after sale and stood ready to receive complaints and give engineering and technical advice. On these facts, the tax was upheld.

Complete Auto Transit v. *Brady*, 430 U.S. 274, 51 L.Ed.2d 326, 97 S.Ct. 1076 (1977), is also distinguishable. There the Supreme Court held that a Mississippi tax on "the privilege of doing business" was not per se unconstitutional under the commerce clause merely because it was applied to an activity that was part of interstate commerce. In that case, however, the court was careful to note that no claim had been made that the activity was not sufficiently connected to the state to justify the tax or that the tax was not fairly related to benefits provided to the taxpayer.

Standard Pressed Steel Co. v. *Wash. Dept. of Rev., supra*, is closer on its facts but is also readily distinguishable from the instant case. Standard, a manufacturer of industrial and aerospace fasteners, had its home office and one manufacturing plant in Pennsylvania and another plant in California. Standard's only employee in the State of Washington was an engineer whose office was in his home and who primarily consulted with the Boeing Company concerning its use of fasteners. Standard's out-of-state offices handled all sales orders, shipments, negotiations and payments. Washington imposed its business and occupation tax upon Standard's gross receipts from the sale of the fasteners to Boeing. In upholding the constitutionality of the tax, the Supreme Court noted that Boeing was Standard's principal customer in the State of Washington and the court cited the findings of the Washington Board of Tax Appeals that "the activities [of

Standard's employee] were necessary to [Standard] in making it aware of which products Boeing might use, in obtaining the engineering design of those products, in securing the testing of sample products to qualify them for sale to Boeing, in resolving problems of their use after receipt by Boeing, in obtaining and retaining good will and rapport with Boeing personnel, and in keeping the invoicing personnel of [Standard] up to date on Boeing's lists of purchasing specialists or control buyers." Id. at 561. The court also noted that Standard's agent in Washington was an engineer whose primary duty was to consult with Boeing regarding its anticipated needs and requirements for aerospace fasteners and to follow up any difficulties in the use of Standard's products after delivery. Further, and importantly, the employee was assisted by a group of engineers of Standard who visited Boeing approximately three days every six weeks. Thus Standard's activites in the State of Washington were numerous and substantial thereby supplying the requisite nexus.

The City also relies on *West Publishing Co.* v. *McColgan*, 27 Cal.2d 705, 166 P.2d 861, *aff'd.*, 328 U.S. 823, 66 S.Ct. 1378, 90 L.Ed. 1603 (1946). The tax imposed against West by the State of California in that case, however, was a tax on net income, as distinguished from a tax on the privilege of engaging in business. Further, contrary to the instant case, West's California employees were authorized to receive payments on orders taken by them, to collect delinquent accounts and to make adjustments in case of complaints by customers. The employees also maintained an inventory of books in the offices of certain attorneys in return for West's use of space in those offices.

Finally, the City relies heavily on *National Geographic Society* v. *California Board of Equalization*, 430 U.S. 551, 51 L.Ed.2d 631, 97 S.Ct. 1386 (1977). That case, however, involved California's imposition of a "use-tax-collection liability" on National Geographic (seller) which was measured by mail-order sales to California residents. National Geographic maintained two offices in California that solicited advertising copy for the seller's

magazine. The United States Supreme Court affirmed the decision of the Supreme Court of California which sustained the assessment. The court held that the activities of National Geographic's two offices provided a sufficient nexus between the seller and California, where the seller's two California offices solicited advertising copy sales which aggregated approximately one million dollars annually. We note, however, that this case differs from the instant case in that National Georgraphic itself operated the California offices. More importantly, however, the obligation imposed was a "use-tax-collection liability" rather than a direct tax on National Geographic. The case therefore , is not controlling. *See Norton Co.* v. *Ill. Dept. of Rev., supra.* Even in *National Georgaphic,* however, we not that the United States Supreme Court rejected the "slightest presence test" which had been applied by the California Court:

> Our affirmance of the California Supreme Court is not to be understood as implying agreement with that court's "slightest presence" standard of constitutional nexus.

430 U.S. at 556.

The factual distinctions between the foregoing cases and the instant case are readily apparent. West's activities in the City consist of a single sales representative who solicits orders and forwards them to West's place of business in Minnesota for acceptance, processing and shipment direct to the consumer. Further, West maintains neither an office nor an inventory within the City. Finally, the obligation which the City seeks to impose is a direct tax on West and not simply the duty to collect a use tax which would ultimately be paid by the consumer.

In *State Tax Comm'n* v. *Murray Co. of Texas,* 87 Ariz. 28, 350 P.2d 674 (1960), *Judgment vacated and case remanded for clarification,* 364 U.S. 289, 81 S.Ct. 53, L.Ed.2d 39 (1960); *second opinion,* 89 Ariz. 61, 358 P.2d 167 (1960); *cert. denied,* 366 U.S. 950, 81 S.Ct. 1903, 6 L.Ed.2d 1243 (1961),[4] our supreme court found that the questioned transaction were interstate in nature

4. The appellee's motion to reinstate judgment was granted on February 1, 1960.

and that the seller's other business activities did not convert the sales into intrastate transactions. Therefore, the sales were found to be protected from Arizona's transaction privilege tax by the commerce clause of the United States Constitution. In that case, Murray was a Delaware corporation with its principal place of business in Dallas, Texas, and a branch office in Fresno, California. It manufactured cotton gins and prefabricated steel buildings which it sold in many states, including Arizona. The disassembled gins and buildings were sent to the site and there assembled. The sales contract provided that Murray would provide an expert to supervise the assembly if requested by the customer. Murray's assembly experts lived in Phoenix but were paid by, took directions from and reported to the Fresno office. The court stated: "We perceive nothing of material benefit to [Murray] performed by [its sales representative] different from what he might have performed as an ordinary salesman visiting the state periodically." 87 Ariz. at 271, 350 P.2d at 677.

CONCLUSION

We conclude that the nexus between West and the City is insubstantial and insufficient to justify the imposition of the privilege license tax in question. The activities conducted by West within the boundaries of the City demonstrate that the City has not offered nor extended any consequential services, protections or benefits for which it can exact the privilege tax.

For the foregoing reasons, the judgement of the trial court is affirmed.

/s/
J. THOMAS BROOKS, *Judge*

CONCURRING:

/s/
JOE W. CONTRERAS, *Judge*

/s/
WILLIAM E. EUBANK, *Judge*

APPENDIX B

SUPREME COURT
STATE OF ARIZONA

201 WEST WING STATE CAPITOL
1700 WEST WASHINGTON
PHOENIX, ARIZONA 85007-2566

January 15, 1986

RE: CITY OF PHOENIX vs. WEST PUBLISHING COMPANY
Supreme Court No. 18442-PR
Court of Appeals No. 1 CA-CIV 6716
Maricopa County No. C-407753

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on January 14, 1986, in regard to the above-referenced cause:

"ORDERED: Petition for Review—DENIED."

RECORD RETURNED TO THE COURT OF APPEALS, DIVISION ONE, PHOENIX, THIS 15TH DAY OF JANUARY, 1986.

DAVID R. COLE, Clerk

TO:

Roderick G. McDougall, Phoenix City Attorney—Attn: Philip Haggerty, Esq.
David W. Eagle, Esq., and Lawrence J. Lee, Esq., Lee, Theisen & Eagle
Glen D. Clark, Clerk, Court of Appeals, Division One, Phoenix

des

APPENDIX C

C-1

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

CITY OF PHOENIX, a municipal corporation,
Plaintiff,

v.

WEST PUBLISHING COMPANY, a foreign corporation,
Defendant.

No. C407753
ANSWER

For its answer to Plaintiff's Complaint, Defendant, West Publishing Company admits, denies and alleges as follows:

. . .

. . .

And, further Defendant alleges as follows:

. . .

P. Defendant has no contact or nexus with the City.

. . .

R. The proposed deficiency violates the equal protection and due process clauses of the United States Constitution and the Constitution of the State of Arizona.

DATED this ..... day of April, 1986.

MOHR, HACKETT & PEDERSON, P.C.

By /s/.....
LAWRENCE J. LEE
300 North Central Avenue
Phoenix, AZ 85012
Attorney for Defendant

APPENDIX D

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

CITY OF PHOENIX, a municipal corporation,
Plaintiff,

v.

WEST PUBLISHING COMPANY, a foreign corporation,
Defendant.

No. C407753
[Minute Entry - June 23, 1982]

This matter having been under advisement,

The Court finds that the City of Phoenix' only contact with West is the fact that Mr. Grucky has chosen to locate his home in the City of Phoenix; that during the years he was covering the entire State, he could just as well have chosen to live in Scottsdale, Mesa, or in an unincorporated portion of Maricopa County.

The Court further finds that the West activities in connection with the 1956 Code were only conducted in Phoenix as being capitol City. (Sic).

The Court further finds that the imposition of Privilege License Taxes on the Defendant, based on the facts of this case, is a violation of the Due Process Clause of the U.S. Constitution and the Arizona Constitution, and is also prohibited by both the Nation and State Constitutions as an impeachment to interstate commerce.

IT IS ORDERED denying Plaintiff's prayer for relief.

APPENDIX E

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CITY OF PHOENIX, a municipal corporation,
Plaintiff-Appellant,

v.

WEST PUBLISHING COMPANY, a foreign corporation,
Defendant-Appellee.

NO. 1 CA-CIV 6716

MARICOPA COUNTY
SUPERIOR COURT
NO. C-407753

APPELLANT'S OPENING BRIEF

ISSUES PRESENTED

I

Where a national law book publisher derives its gross receipts from sales to ultimate users and

1. has solicited from a State Code Commission the right to publish annotated State statutes, and supported this solicitation by sending editorial employees into the State and to a city within that State to assist in the compilation of these statutes and

2. maintained a full-time employee salesman within that city's jurisdiction actively soliciting sales of its published books from customers within the city and otherwise maintaining his employer's presence therein;

is not such a book company liable to the city for a privilege tax imposed on business activity within the city measured by the sales of books to customers located within the city?

II

Where a city's privilege tax on sales receipts activity by a book seller is apportioned solely on the basis of sales to customers

within that city, and where the seller maintains a full-time employee salesman within that city, is not such a tax permissible in the face of claims that it contravenes the Commerce Clause of the Federal Constitution or the Due Process clauses of either the State of Federal Constitution?

APPENDIX F

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CITY OF PHOENIX, a municipal corporation,
Plaintiff-Appellant,

v.

WEST PUBLISHING COMPANY, a foreign corporation,
Defendant-Appellee.

NO. 1 CA-CIV 7616
DEPARTMENT C

PETITION FOR REVIEW
BY SUPREME COURT

COMES NOW the City of Phoenix, by and through its counsel undersigned, and pursuant of the provisions of Rule 23, and files with the Clerk of the Court of Appeals, this Petition for Review by the Supreme Court, of the decision of this Court, filed September 17, 1985.

DATED this 1st day of October, 1985.

II

Issues Presented for Review

Where a foreign law book publishing corporation has generated substantial business activity from its prospective customers within a city in a foreign state by;

(a) Soliciting and organizing the total revision and annotation of the state statutes, using in-city activities of its editorial staff directing and supervising the creation and organization of the material necessary for such revision; and

(b) Maintaining and enhancing its commercial presence in the city through a full-time employee salesman who was delegated and assumed responsibility for the (i)

generation of new business activity and the servicing of old customers; (ii) providing advice on law library establishment, research assistance, associated problems and complaint referral, and (iii) maintaining general goodwill and visibility with respect to his company, in addition to taking orders and credit information;

Does not such corporate activity establish a sufficient connection with the city to justify the imposition of a city's privilege license tax on business activity from sales within the city, and based only on sales within the city, to meet constitutional standards set by the Supreme Court of the United States relative to taxation of interstate activity?

Supreme Court, U.S.
FILED
MAY 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1683

In The
Supreme Court of the United States
October Term, 1985

CITY OF PHOENIX, a municipal corporation,
Petitioner,

v.

WEST PUBLISHING COMPANY,
a foreign corporation,
Respondent.

On Writ of Certiorari to the Court of Appeals of the State of Arizona

BRIEF IN OPPOSITION

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No. 85-1683

In The
Supreme Court of the United States
October Term, 1985

CITY OF PHOENIX, a municipal corporation,
Petitioner,

v.

WEST PUBLISHING COMPANY,
a foreign corporation,
Respondent.

On Writ of Certiorari to the Court of Appeals of the State of Arizona

BRIEF IN OPPOSITION

FACTS

Other than the residence of a sales solicitor, Arthur Grucky, in the City of Phoenix (hereinafter the "City"), West Publishing Company (hereinafter "West") does not have an office in Phoenix, nor one elsewhere in the State (at times, there has been a sales solicitor living

in Tucson). (TR p. 90; TAH p. 30; TR Exhibit 10).* West does not have a telephone listing in the City of Phoenix as West Publishing Company (TR p. 90), although Mr. Grucky has personally purchased a telephone listing as "representative." (TR p. 9) West has no inventory or warehouse in the City. (TAH p. 25; TR Exhibit 10)

West markets its products by direct mail and through sales solicitation. (TR pp. 86, 113; TAH p. 25; TR Exhibit 10) Direct mail orders are obtained through advertising and customer initiated contacts with West at St. Paul. Solicitation is undertaken by Mr. Grucky, who solicits an order and transmits it to St. Paul for acceptance. Orders have been rejected by West in St. Paul. (TR p. 88) The sales solicitor has no power to bind West. (JPS p. 2, Index No. 59; TR p. 59; TAH p. 26; TR Exhibit 10)

Mr. Grucky was responsible for less than 12.11% of sales into the City of Phoenix. In fact, the 12.11% figure includes certain direct sales (mail order) by West into Phoenix with which Mr. Grucky had no connection. (TR p. 71, l. 18 to p. 72, l. 5) In calculating the agreed 12.11% figure, Mr. Richard Colvin, West tax accountant, actually overstated Mr. Grucky's sales efforts in Phoenix by including all gross revenues derived from individual direct sales in excess of $200.00 from Minnesota to Phoenix. (TR p. 103, ll. 15-21)

If and when an order is accepted, it is shipped or mailed from St. Paul. (TR pp. 59, 78; TAH p. 24; TR Exhibit 10) Mr. Grucky has no connection with product shipping. (TR p. 78) Title to the materials is transferred upon delivery to the carrier. (JPS p. 3, Index No. 59; TR p. 89; TAH pp. 24, 28; TR Exhibit 10) The direct mail

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* JPS—Joint Pretrial Statement; TR—Transcript by Reporter; TAH—Tax Administration Hearing Transcript.

business is conducted solely and exclusively in St. Paul. (TR p. 83)

Mr. Grucky has only one function, that of seeking orders. (TR pp. 88, 113) While he may assist out of interest in customer complaints, such is not his function and complaints are handled in St. Paul by the Customer Service Department. (TR pp. 60, 116; TAH pp. 32, 33; TR Exhibit 10)

Mr. Grucky is an employee of West. (TR p. 54) However, Mr. Grucky arranges and pays his own yellow page advertising and enters and pays for his own telephone listing. (TR pp. 62, 71, 90) Mr. Grucky can be paid a commission on certain direct mail order transactions even if he had nothing to do with the transaction. (TR pp. 65, 72, 114; Exhibit 7, 8; TR p. 62) Mr. Grucky pays all of his personal expenses in soliciting orders. West does not reimburse them. (TR p. 71, ll. 10-17) Mr. Grucky has no involvement in advertising. (TR p. 70) The only evidence of West advertising in Arizona admitted at trial is dated after June 1980.

Although the City makes much of the Arizona Code Commission and its development of the Arizona statutes, it failed to produce any evidence at trial of West's direct involvement with that Commission. As Mr. Grucky testified and as the trial court observed (without objection) (TR p. 68), it was the practicing bar that put the statute plant together. West's contacts with the plant in 1956 were minimal, and the editing and publishing of the Arizona statutes took place in St. Paul.

West was licensed in 1970 by the State of Arizona for use tax purposes. (TR p. 42) Such a tax is a tax on

the customer and is not a tax for the privilege of con .act-ing business. (TR p. 42) The State statutes and Phoenix City Code concerning the use tax are different. (TR p. 51) Section 14-48 of the Phoenix City Code requires that only retailers obtain a license for the use tax. West believed and believes that it is a publisher-manufacturer. West believed that the exemptions in Section 14-50 of the Phoenix City Code applied: (2) —interstate commerce; (6) the sales were made in St. Paul; and (7) in that the periodicals were exempt. West has made a reasonable effort to keep abreast of local tax matters. (TR p. 50)

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ARGUMENT

West requests that the Petition for Certiorari filed by the City be denied for the following reasons, each of which will be discussed in turn:

1. The decision below was supported by an adequate state law basis.

2. The Petition raises no issue of national/federal importance.

3. The lower court's decision is supported by substantial evidence, and the case cited by the City as dispositive is in fact distinguishable.

I. ADEQUATE STATE LAW BASIS SUPPORTS THE DECISION BELOW

Since its initial challenge of the Phoenix city privilege tax assessment, West has maintained that the tax as applied to West violated both the Arizona and Federal Constitutions. West pled the violation of Article II, Section 4 of the State Constitution in its Answer. *See* Appendix C-1, Petition for Certiorari. Moreover, the trial court specifically held:

> "[T]he imposition of privilege license taxes on the defendant, based on the facts of this case, is a violation of the due process clause of the U.S. Constitution and the Arizona Constitution. . . ."

The Arizona Court of Appeals quoted the trial court's finding and affirmed the decision. *City of Phoenix v. West Publishing Co.*, — Ariz. —, 712 P.2d 944 (1985). The Arizona Supreme Court declined to review the matter.

The analysis made by the Arizona courts below conclusively establishes an adequate state law basis for the decision. The City recognizes that the State Constitution was raised in West's pleadings,[1] but tries to avoid the ramifications of the lower court decisions by incorrectly stating that no Arizona court cited the appropriate state constitutional provisions. However, the trial court specifically found the application of the Phoenix privilege tax to West "violated the due process clause of the Arizona Constitution."[2]

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[1] Page 7, Petition for Certiorari.

[2] The Arizona due process clause of the Arizona Constitution, Article II, Section 4, reads: "No person shall be deprived of life, liberty, or property without due process of law."

Further, § 14-2 of the Phoenix City Code provides as follows:

> "There is hereby levied upon persons on account of their business activities within the City . . . privilege taxes . . ."

Arizona Courts have rendered a decision determining that a local ordinance does not apply to West Publishing Company. It is a decision on a narrow subject of local interest only.

This Court has a long established policy of deferring Federal constitutional questions when a challenged decision may properly rest on state grounds. As long ago as 1935, Justice Brandeis succinctly noted:

> "The court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . . Appeals from the highest court of a state challenging its decision of a question under the Federal constitution are frequently dismissed because the judgment can be sustained on an independent state ground." Concurring Opinion of Justice Brandeis, *Ashwander v. Valley Authority*, 297 U.S. 288, 56 S.Ct. 588, 80 L.Ed. 688.

In *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), the Court held that jurisdiction failed where the state court judgment was supported by adequate state grounds.

It is axiomatic that state courts are the final interpreters of state constitutional law. This is simply judicial recognition of the separation of powers doctrine, as stated most clearly in *Herb v. Pitcairn*, 324 U.S. 117, 125-126, 65 S.Ct. 459, 89 L.Ed.2d 789 (1944):

> "This Court from the time of its foundation has adhered to the principle that it will not review judg-

ments of state courts that rest on adequate and independent state grounds. . . . The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." (citations omitted)

The City offers no explanation as to why Arizona courts are not free to base their decision on state constitutional grounds. Nor does the City allege that the lower courts' interpretation of the Arizona due process clause conflicts with the Federal Constitution.[3] Instead, the City incorrectly argues that no Arizona court considered the State Constitution, or alternatively that the decision rendered was in no way based upon state constitutional grounds. However, the above principles apply even if it could be asserted that no Arizona court *expressly* based the decision on state constitutional law: "Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested on a non-federal ground, this court will not take jurisdiction to review the judgment." *Durley v. Mayo*, 351 U.S. 277, 76 S.Ct. 806, 100 L.Ed. 1178 (1956) (emphasis in original).

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[3] State courts are empowered to provide greater protection to an individual under the State Constitution than might be afforded by the Federal Constitution. *Oregon v. Hass*, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975). *See also State v. Opperman*, 247 N.W.2d 673, 675 (S.D. 1976).

II. THIS CASE PRESENTS NO ISSUE OF NATIONAL IMPORTANCE

This Court may decline to grant certiorari when the issues raised in the Petition are not of national importance.

The present Petition is one in which no issue of national significance is raised. The petition simply represents the dissatisfaction of a local government with an adverse decision rendered by its own state courts. This is not a situation in which a state seeks to improperly *impose* a tax on activities protected by the United States Constitution or other federal law basis. The Arizona Court of Appeals did not extend the City's taxing authority so as to include constitutionally protected areas. Instead, the decision in this case *restricts* the extent of the City's ability to tax intrastate and interstate commerce. This court rarely grants a state's petition for certiorari to review judgments rendered by state courts in favor of their citizens. *See, Michigan v. Long,* 463 U.S. 1032, 1069, 103 S.Ct. 3469, 3491, 77 L.Ed.2d 1201, 1233 (1983) (Stevens, J. dissenting). Various other Justices have expressed the concept in dissents,

> "I continue to believe the justifications for review in the Court are at their weakest in such cases where no individual rights are alleged to be violated and where a state court speaks to its own institutions." *See, Ponte v. Real,* 471 U.S. —, 105 S.Ct. 2192, 2209, 85 L.Ed.2d 553, 575 (1985) (Marshall, J. dissenting).

See also, Boag v. MacDougall, 454 U.S. 364, 367-368, 102 S.Ct. 700, 702, 70 L.Ed.2d 551 (1982) (Rehnquist, J. dissenting). In *Rudolph v. U.S.,* 370 U.S. 269, 82 S.Ct. 1277, 8 L.Ed.2d 484 (1962) this court held that certiorari was

improvidently granted where the action to recover income taxes involved factual issues and the decisions would be of no importance save to the parties. Assuming, *arguendo*, this issue was incorrectly decided, the consequence is of no national importance at all. The legal principles have been clearly enunciated in the cases set forth in part III, *infra*. At most, the State of Arizona deprived itself, or its political subdivisions, of revenue which it might have otherwise collected from intrastate and interstate commerce.

Moreover, even the implications of the decision on Arizona law may be limited for the determination of whether there exists sufficient constitutional nexus for taxing purposes necessarily turns upon the facts and circumstances surrounding each case.

III. THE LOWER COURT PROPERLY FOUND SUBSTANTIAL NEXUS TO BE LACKING

The trial court found that West's only contact with the City of Phoenix arose by virtue of the fact that one of West's salesman, Arthur Grucky, independently chose to live within the City of Phoenix.[4] The Arizona Court of Appeals observed that West markets the bulk of its products by direct mail conducted solely and exclusively in Minnesota; that West does not own or lease an office or other facility in Arizona; and that West does not maintain any inventory in Arizona. The Court of Appeals further found that West's only "presence" in Phoenix was attributed to a single salesman, who performed only one function—seeking orders and answering questions relative to West products. It was stipulated by the parties

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[4] West did not require Grucky to live in Phoenix.

that the salesman's activities within Phoenix comprised less than twelve percent of West's gross revenue in the City, and that the balance of the transactions were conducted by direct mail between West and its subscribers.

Based upon these particular facts, the court held that "the nature and quantity of West's activity in the City of Phoenix, as above described, are not sufficient to provide the requisite constitutional nexus for the tax sought to be imposed." *See* Appendix, page A-6, Petition for Certiorari. This finding was clearly based on substantial evidence submitted to the trial court.

Contrary to the City's assertions, the decisions rendered by the trial court and the Court of Appeals are not "flatly and absolutely contrary to the decision of this Court in *Standard Pressed Steel Co. v. State of Washington,* 419 U.S. 560, 95 S.Ct. 706, 42 L.Ed.2d 719 (1975)". Page 7, Petition for Certiorari. Instead, the facts in that case are distinguishable from those at bar, and *Standard Pressed Steel* does not require reversal of the decision in this case.

In *Standard Pressed Steel,* Boeing was the taxpayer's primary if not only customer. Standard relied on its employee in Washington to conduct *all* elements of the business relationship with Boeing, including substantial engineering activities. Moreover, the employee was paid a salary to perform these ancillary services for Boeing, demonstrating the import attached to the activities by the taxpayer.

The *Standard Pressed Steel* court cited findings of the Washington State Board of Tax Appeals below and found

that the activities of the employee were *necessary* to Standard in making Boeing aware of which products Boeing might use, in obtaining engineering designs from Boeing, in securing testing of samples from Boeing, and in resolving Boeing's problems. Put differently, the employee's activities were required to maintain the realization and continuance of the taxpayer's relationship in Washington with Boeing. This Court ruled that the employee "made possible" taxpayer's relationship with Boeing in the State, and therefore a substantial nexus had been established between taxpayer and the State of Washington to justify the imposition of a State *use* tax on revenues derived from Boeing.

The facts, as well as the tax itself, are readily distinguishable in the present action. Unlike the principal customer in *Standard Pressed Steel,* all of Mr. Grucky's contacts with West customers together comprised less than twelve percent of West's total revenue in Phoenix. Moreover, Mr. Grucky's activities were not required to maintain West's business relationship with its customers. Further, the privilege tax is imposed on West and not imposed upon its customers as a use tax. The City initially sought to collect this tax on all of West's sales into the City of Phoenix together with fifty percent of West's sales allocated to Mr. Grucky even though made outside the City. (TR 102)[5] Finally, this tax is imposed upon direct sales with which Mr. Grucky had no connection.

The fact that Mr. Grucky solicited sales from customers did not "make possible" *West's* business in Phoenix.

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[5] The City abandons the out-of-city aspects of this tax in its brief to the Arizona Court of Appeals.

Itinerate drummers and traveling salesmen do not conduct activities sufficient to establish a substantial nexus for tax purposes. *Norton Co. v. Ill. Dept. of Rev.,* 340 U.S. 534, 71 S.Ct. 377, 95 L.Ed. 517 (1951); *McLeod v. Dilworth,* 322 U.S. 327, 64 S.Ct. 1023, 88 L.Ed. 1304 (1944); *West Points Wholesale Grocery Co. v. City of Opelika, Alabama,* 354 U.S. 390, 77 S.Ct. 1096, 1 L.Ed.2d 1420 (1957); *Memphis Steam Laundry Cleaner v. Stone,* 342 U.S. 389, 72 S.Ct. 424, 96 L.Ed. 436 (1951). Imposing a tax on such an event would mean that a taxpayer's "slightest presence" establishes a nexus, a position which was expressly rejected by this Court in *National Geographic Society v. Calif. Board of Equalization,* 430 U.S. 553, 97 S.Ct. 1386, 51 L.Ed.2d 631 (1966). The proper inquiry under *Standard Pressed Steel,* is whether such activities are so *numerous* that it can be fairly said that the taxpayer's business relationships in state are made possible by its employees; or whether the *nature* of the employee's activities as a whole are such that without them, the taxpayer's business relations in the jurisdiction would be substantially impaired. As the trial court necessarily found, Mr. Grucky's activiites are not so numerous as to "make possible" West's business relations in Phoenix.

The City has steadfastly urged that every attorney in Phoenix must have certain West publications in order to effectively practice law. Nowhere did the City prove that Mr. Grucky's activities in Phoenix were required or necessary for West to obtain that business. There is nothing in the record to suggest that those Phoenicians who dealt with West directly did so primarily because of Mr. Grucky and his activities in Phoenix. Indeed, had West chosen to keep Mr. Grucky in Minnesota, one may assume that ad-

vertisements as to the availability of West's publications and services would have still reached Phoenix customers. There is no evidence that because Mr. Grucky chose to live in Phoenix instead of elsewhere that the nature of his activities changed from that of a drummer to someone who "makes possible" West's business relationships. Moreover, the City offers nothing to demonstrate it was necessary or even beneficial for West to have Mr. Grucky located in Phoenix in order to procure Phoenix sales. In finding for West, the trial court correctly observed:

> "The court finds that the City of Phoenix' only contact with West is the fact that Mr. Grucky has chosen to locate his home in the City of Phoenix; that during the years he was covering the entire state, he could have just as well chosen to live in Scottsdale, Mesa, or in an unincorporated portion of Maricopa County."

In sum, the determinative factors in *Standard Pressed Steel* which supported imposition of the State tax are not present here. Rather, the Arizona courts determined that insufficient nexus existed to justify imposition of the tax, and this determination is supported by the findings of fact made by the trial court below.

RESPECTFULLY SUBMITTED this 28th day of May, 1986.

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